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United States Supreme Court

OCTOBER TERM, 1952

No. 508

JOHN W. PATTISON, ALETHEIA E. PATTISON, ANNA W. PATTISON, ERNESTINE PATTISON, MARIE S. PATTISON, ELI G. ALGORN III, ROBERT S. ALGORN, JR., EDITH M. ALGORN, JANET ALGORN WAGNER, ESCULENE E. WILLIAMS, AND LATHROP S. NELSON,

Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO, AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES SUPREME COURT

OCTOBER TERM, 1952

No. ——

JOHN W. PATTISON, ALETHEIA E. PATTISON, ANNA W. PATTISON, ERNESTINE PATTISON, MARIE S. PATTISON, ELI G. ALCORN III, ROBERT S. ALCORN, JR., EDITH M. ALCORN, JANET ALCORN WAGNER, ESCULENE R. WILLIAMS, AND LATHROP B. NELSON,

Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Janet Alcorn Wagner, Esculene R. Williams, and Lathrop

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO, AND BRIEF IN SUPPORT THEREOF

May it Please the Court:

The petition of John W. Pattison, Aletheia E. Pattison, Anna W. Pattison, Ernestine Pattison, Marie S. Pattison, Eli G. Alcorn III, Robert S. Alcorn, Jr., Edith M. Alcorn,

B. Nelson, Petitioners herein, as stockholders of the respondent corporation, respectfully shows to this Honorable Court:

A

Summary Statement of the Matters Involved

In July, 1941 the directors of The Union Central Life Insurance Company adopted a plan for mutualization of said company and the plan was approved by the stockholders on August 7, 1941. The plan was not approved by the state superintendent of insurance until June 27, 1947. When the plan was adopted by the stockholders it was represented by the directors that the price of $25.00 per share was fair and reasonable. Thereafter the stock increased in value. Some of the stockholders refused to surrender their shares for cancellation. The company filed suit against these shareholders, basing its petition on G. C. § 9364-2a. Defendants admitted that through the instrumentality of a voting trust they had voted in favor of mutualization. Their answer set up eight reasons because of which it was claimed that what was done was not effective to accomplish mutualization: (1) the long delay before approval by the superintendent; (2) representations by the directors that the price of $25 per share was fair and reasonable; (3) the enhancement in value of the stock since the plan was approved; (4) the inability of the defendants to sell the stock at its enhanced value because of the pendency of the mutualization proceedings; (5) inadequacy of dividends declared during said period; (6) failure to notify defendants of the meeting of the policy holders; (7) expiration of the voting trust in which defendant joined; (8) change in personnel of the policy holders during the interval.

The prayer of the petition was granted by the Common Pleas Court and a like decree was entered by the Court of Appeals of Hamilton County.

B

Reasons Relied Upon for the Allowance of the Writ

1. The decision of the Supreme Court of Ohio, affirming the decision of the Court of Appeals of Ohio, decided a federal question of substance not theretofore determined by this Court and has decided it in a way probably not in accord with applicable decisions of this Court.

2. The decision of the state court is in violation of the rights of petitioners as guaranteed under Article (1), Section 19, and Article (2), Section 28, of the Constitution of the State of Ohio, and Section 10, Article (1), and Section 1, of the 14th Amendment to the Constitution of the United States of America.

3. The decision of the state courts involved a construction of Sections 9364-1, 9364-2a and 9264-8 of the General Code of Ohio and the construction placed on said sections of the Code, in their application to the facts herein, result in the impairment of the obligation of the contract between the stockholders and the company and amounts to the taking of property without due process of law, in violation of the constitutional provisions above mentioned.

4. Unless a decision is made by this Honorable Court upon the state of facts existing in the present cause, the petitioners as stockholders of respondent corporation will be deprived of their rights and assets in the corporation and will have their contracts impaired by the distribution of $20 million of corporate funds of the stockholders to the policyholders.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio commanding that Court to certify and to send to this Court for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket 33331, The Union Central Life Insurance Co. v. John W. Pattison et al, defendants-appellees, and that the said judgment of the Supreme Court of Ohio, entered by it on February 18, 1953, wherein it refused a motion to certify the record to the Court for review, dismissed the petition and overruled application for rehearing, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

John W. Pattison,
Aletheia E. Pattison,
Anna W. Pattison,
Ernestine Pattison,
Marie S. Pattison,
Eli G. Alcorn III,
Robert S. Alcorn, Jr.,
Edith M. Alcorn,
Janet Alcorn Wagner,
Esculene R. Williams, and
Lathrop B. Nelson,

Petitioners.

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UNITED STATES SUPREME COURT

No. ——

JOHN W. PATTISON, ALETHEIA E. PATTISON, ANNA W. PATTISON, ERNESTINE PATTISON, MARIE S. PATTISON, ELI G. ALCORN III, ROBERT S. ALCORN, JR., EDITH M. ALCORN, JANET ALCORN WAGNER, ESCULENE R. WILLIAMS, AND LATHROP B. NELSON,

Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the Supreme Court of Ohio is reported in 158 O. S. 563. The opinion of the Court of Appeals for the First Appellate Judicial District is not reported. A copy is set forth at page 22 post. The opinion of the

Common Pleas Court is not reported. A copy is set forth at page 21 post.

II

Jurisdiction

1. The jurisdiction of this Court to entertain a petition for a writ of certiorari and the allowance thereof is provided for in Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Statutes 937, particularly Section 237 (a) (b).

2. The date of the judgment and decree to be reviewed is February 18, 1953, at which time the Supreme Court of Ohio rendered its decision in cause No. 33331, wherein it decided that petitioners' appeal be dismissed for the reason that no debatable constitutional question is involved.

3. The ruling of the lower court affirmed by the Court of Appeals and the Supreme Court of Ohio has, in effect held that the Respondent may take $20,000,000 from its *stockholders* and give it to the *policyholders.* The decisions of the Ohio courts, in this case, are in direct violation of the guarantees contained in Article 1, Section 19, and Article 2, Section 28, of the Ohio Constitution, and Section 10, Article 1, and Section 1, of the 14th Amendment to the Constitution of the United States of America.

There are no decisions by this Court covering a similar state of facts. However, the decision of this Court, in the case of *Massachusetts* v. *Mellon,* 262 U. S., 447, and *Stark, et al.* v. *Wickard, Secretary of Agriculture,* 321, U. S. 288 and *Connecticut Mutual Life Ins. Co.* v. *Moore,* 92 Law. ed. 647, seem applicable, but Ohio did not follow their reasoning or holding.

4. The jurisdiction of this Court is sustained by Rule 38, Section 5 (a). See, also *Matthews* v. *Huwe,* 269 U. S. 262;

Cuyahoga River Co. v. *Northern Realty Co.*, 244 U. S. 300; *Eau Claire National Bank* v. *Jackman*, 204 U. S. 522.

III

Statement of the Case

Actions were filed by the Respondent against eleven of its stockholders to compel surrender of their shares of stock for twenty-five ($25.00) Dollars per share under a Mutualization Plan pursuant to Section 9364-2a General Code of Ohio. The petitions were consolidated pursuant to a stipulation and a consent order.

The following facts were developed by the pleadings and supported by the evidence.

The Union Central Life Insurance Company is an Ohio corporation engaged in the life insurance business with its principal office in Cincinnati, Ohio. It had 125,000 shares of capital stock with a par value of $20.00.

On July 25, 1941, the Board of Directors adopted a plan for the conversion of the Company from a stock company to a mutual company in accordance with the Ohio General Code Sections 9364-1 to 9364-8. The Plan of Mutualization provided for the acquisition of all the outstanding shares of stock at a price of $25.00 per share, for a total of $3,125,000.00.

On August 7, 1941, the Mutualization Plan as adopted by the directors was submitted to a vote of the stockholders and a majority voted to approve the plan. A majority of the votes cast in favor of the Mutualization Plan at this stockholders' meeting were voted by trustees under a Voting Trust Agreement for seven years, dated January 2, 1940, which Agreement had specifically authorized the

trustees to vote for approval of a plan of mutualization and sale of the stock *for not less* than $25.00 per share

The petitioners signed this Voting Trust Agreement, and their stock was voted in favor of the Plan. *When the Voting Trust Agreement expired on January* 1, 1947, *the petitioners refused to give an extension.*

A meeting of policyholders was called by the Superintendent of Insurance of Ohio to pass upon the Plan of Mutualization for October 24, 1941.

The policyholders' meeting was adjourned until April 30, 1942, and after one further adjournment was adjourned to meet at the call of the Superintendent of Insurance of Ohio. The Superintendent of Insuurance reconvened the policyholders' meeting on June 26, 1947 *six months after the petitioners had withdrawn from the Voting Trust.* At this reconvened meeting the ballots cast in 1941 were counted and it was determined that the policyholders of the company had voted in 1941 for the approval of the Plan of Mutualization.

Between January 1, 1941, and the year ending 1947, the percentage of change-over, that is new policyholders coming in, and who therefore could not have voted in 1941, and old policies which have matured, and who therefore were no longer policyholders in 1947, the total number of change was 220,000 policies out of 302,000, or a total of seventy (70%) per cent.

A specimen policy of insurance indicated that the claims of the policyholders were limited to certain amounts, and that they had no claim whatsoever on the capital or surplus of the corporation. The petitioners established by minutes of the Board of Directors meetings during the years 1941 to 1948, that the Plan of Mutualization was deferred from time to time by reasons of war conditions; that in corres-

pondence between the President of the Company and stockholder, he stated that there would be another vote by the stockholders, as to whether or not they were in favor of Mutualization. These exhibits also established the financial condition and the tremendous growth of the Company during the years in question.

The evidence and the exhibits clearly disclose that the Plan adopted in 1941 was not pursued by the Company with the idea of carrying it out; that it was suspended for war reasons; that it was not pursued diligently or with an indication that it was intended to be complied with and adopted. The evidence disclosed that when the Voting Trust expired in January of 1947, no effort had been made at that time to obtain either the vote of policyholders, or approval of the Superintendent.

The evidence clearly indicated that *at no time has there been a valid vote by policyholders!* It certainly is convincing, as we have pointed out above, that out of the 240,000 policyholders, only 52,000 sent in ballots, with roughly 47,000 for and 4,700 against Mutualization, and these ballots were sent in by policyholders who held insurance policies with the Company in 1941. The Company failed to establish, that any of those policyholders who voted in 1941 were still policyholders when their votes were counted in 1947. The evidence offered by the petitioners, indicated that seventy (70%) per cent of the policyholders who had voted in 1941 were no longer policyholders in 1947. There was a complete failure of proof, so far as respondent was concerned on this issue.

Respondents own witness Alfred M. Best testified that the method of valuing stocks as established by Commissioners of Insurance and as published in his book, does provide for taking book value into consideration. The

witness admitted (R-263), that if he applied the same formula in valuing the stock of the Respondent in 1947, as he used in 1941, that the value of the stock in 1947 and 1948, would be One Hundred ($100.00) Dollars more per share, or a total of One Hundred Twenty-Five ($125.-00) Dollars per share. That is to say, that if the surplus were taken at three (3%) per cent of reserves in 1948, the amount set up per share would be Twenty-Five ($25.00) Dollars, and the additional two (2%) per cent which was raised from three (3%) per cent to five (5%) per cent would raise the value of the stock per share to One Hundred Twenty-Five ($125.00) Dollars each.

The exhibits introduced during the progress of the testimony substantiated the figures as given by the witnesses and clearly showed that the surplus had increased from $11 million to $28 million, or for a total of some $17 million and divided among 125,000 shares, would justify a value of at least One Hundred Twenty-Five ($125.00) Dollars per share.

IV

Specification of Errors

1. The Ohio courts committed error in finding and holding that the statutes in question were constitutional and that their operation as applied to the state of facts exising in the instant case did not interfere with the constitutional rights of petitioners.

2. The Ohio courts committed error in holding that the rights and properties of petitioners could be taken away under and by reason of G.C.O. 9364-1, 9364-8 and 9364-2a.

3. The Ohio courts committed error in failing and refusing to declare the rights of petitioners to be such that

the respondent company could not be converted from a stock life insurance company to a mutual life insurance company, except upon the vote by its *then* policyholders, according to the statute, and upon payment to petitioners of full value.

ARGUMENT

A. Failure to Carry on Plan of Mutualization to Completion Before Time Limitation of Voting Trust Constituted Abandonment of Plan

a. Unreasonable Delay in Carrying out Plan Justified Holding That Plan Was Abandoned

In the brief of Respondent in the Lower Court, it was contended that under the decision of *Oborn* v. *Taylor*, 52 Abs. 438, a mutual option between two partners is a continuing option and a delay of six years in accepting it, is not an unreasonable time. As the Court points out in that case, an option of that sort between partners is meant to be continuing during the life of the partnership. In the present case, if the vote of the shareholders for mutualization were to be considered as a continuing option, it must be taken into connection with the general plan, as to what would be reasonable as the length of time to hold such an option as continuing. *In no event, could it continue beyond the life of the Voting Trust, which was fixed as of January* 1, 1947, *and at which time the option had not been accepted by the company.* In this connection, we direct the Court's attention to the following cases:

Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 587.

> "The doctrine is well settled, that the option to avoid such a sale must be exercised within a

reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the Statute of Limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised.

"In fixing this period in any particular case, we are but little aided by the analogies of the Statute of Limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give this latter great force in consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his rights to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitabley to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity".

United States v. 813.96 *Acres of Land, More or less, Quachita County, Ark., et al.* 45 Supp. 535.

"Where United States took no action to consummate its purchase of lands before filing petition to condemn them and declaration of taking thereof nearly two years after is acceptance of option to purchase them within time allowed by option agreements, which provided that United

States should have reasonable time to secure and examine abstract or certificate of title, landowners were released from agreement to sell land at prices stipulated in options and entitled to show market value of lands on date of taking in condemnation proceedings, since government failed to act within "reasonable time". Bankhead-Jones Farm Tenant Act, Sec. 3134, U.S.C.A. Secs. 1010-1913; 40 U.S.C.A. Sec. 258a; U.S.C.A. Const. Amend. 5."

Pfister v. *Cow Gulch Oil Co.* 189 F. 2d 311 at page 315.

Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time. A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide, when the danger is over and the risk has been that of another, to come in and share the *profit,* is obvious. In such circumstances, persons having claims to property are bound to use the utmost diligence in enforcing them."

B Failure of Proof on Strict Compliance With Statutory Steps Requires Dismissal of Petition.

Respondent starts with the premise, that all four steps required by the statute had been completed.

Section 9364-1 of the General Code is very specific in providing the kind, type, age and qualification of policyholders who are entitled to vote. It specifically provides that "(3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders, each insured in at least One Thousand ($1,000.00) Dollars, *and whose insurance shall THEN be in force, and shall have been in force for at least one year prior to such meeting*".

This is one of the things respondent had the burden of establishing. That the policyholders had policies of One Thousand ($1,000.00) Dollars or more, and were in force for at least one (1) year. In 1941 the evidence indicated the policies were checked by the Superintendent of Insurance. The evidence also indicated that whether or not the policies were *"then"* (which certainly means 1947 when the ballots were counted) in force is not established. The evidence offered by the petitioners, as well as Exhibit 1 and 2 clearly indicated that no check was made in 1947 to determine whether such policies were *"then"* in force!

C The Surplus Belongs to the Stockholders

The experts produced by respondent seemed to go on the theory that as an actuarial matter, the surplus of an insurance campany belongs to the policyholders, and no part of it is to be taken into consideration, in computing values for the stock. This view of the experts is contrary to the decisions of the Courts of Ohio. We direct the Court's attention to the case of *Tax Commission of Ohio* v. *Clark*, Exrx., 20 Ohio App. 166:

> "Stockholders of corporation own its capital stock, its 'surplus', meaning that which is left

when use is satisfied, or the excess beyond what is prescribed, and its 'franchise', including good will."

State of Ohio, Ex. rel. Wade H. Ellis, Attorney, v. *Union Central Life Insurance Company,* 13 O.C.C. N.S. 49:

"Where it is undisputed that a life insurance company is a stock company, the fact that the impression was conveyed by its agents that it was doing a mutual business, and that policyholders who elected to take participating contracts had written in their contracts that they should share in the profits 'as apportioned by the company', does not transform the company into a mutual company, or make even the participating contracts mutual insurance contracts, or estop the company from treating the surplus fund as belonging to the stockholders.

"This company had at the date in question a surplus of over $2,400,000.00. To whom does this belong? Undoubtedly to the company. And who are the company? The stockholders. Not a penny of it belongs to any policyholder. This surplus was accumulated by the company through a wise and judicious management of its business —the foundation of which was from the premiums paid into the company by its policyholders the most of which came no doubt from the policies long since matured and which have been adjusted to the entire satisfaction of the policyholder and the company. This surplus adds strength and stability to the company as a whole, and is not there for the benefit or protection of the participating policyholders. It was not so intended and could not have been so understood. The evidence in this case disclosed that during a large portion of the time that the company wrote non-participating policies they produced a loss, and such loss

was more than made good from the profit derived from the participating business. The state of Ohio did not object to this, nor did any policyholders, so far as we are advised.

Belden v. *Life Insurance Company*, 28 O.O. 438:

"It may be stated as indisputable propositions of general law that corporations organized for profit, as are these defendants, are not required to create surpluses. Neither are they required to maintain such. Their directors may declare dividends out of earnings undistributed, or earnings that have been passed to surplus account so long as it is done in good faith, that is to say, if it is not declared to the detriment of corporation creditors. It is also lawful for corporations to not only increase but to diminish their capital structure, subject to the same limitation. Particularly considering the matter of declaration of dividends from surplus accounts, it is observed that Section 9362, General Code, first enacted in 1872 (69 Ohio Laws 154), permits insurance corporations to make dividend payments to stockholders from surplus accounts after reserve requirements are met. This statute was in existence when plaintiffs procured their policies. They knew or must have known that surplus accounts in insurance companies organized for profit belonged to those stockholders whose capital was invested in the enterprise, subject of course to the limitation previously noted. Here again it is pertinent to observe that plaintiffs do not plead insolvency, but plead, in The Union Central Life Insurance Company case, that stock retirement out of surplus lessens that fund and impairs their security and takes without due process of law that in which they have a vested interest. In The Ohio National Life Insurance Company case they plead that reserve

> frunds are to be used to consummate the plan. This the latter company denies, thereby creating a question of fact which requires evidence."

It must be evident from the above citations, that the surplus belonging to the stockholders, on a mutualization, the value of the stock is determined by allocating the surplus to stock, and when that is done, the value for each share of stock exceeds One Hundred Twenty-Five ($125.-00) Dollars.

We therefore have the situation where the policyholders as a group, in effect, want to buy out the stockholders as a group. This is a matter of bargaining between the two groups. Such bargaining is facilitated by the provisions of the sections of the Code, 9364-1 to 9364-8.

The statutes in Ohio are not greatly different than similar statutes of a dozen other states. In the mutualization of the Prudential Life Insurance Co. (132 N. J. Equity, 179), the Court considered the company where it had some twenty million indivduals, holding some thirty-two million policies. The corporation had 40,000 shares of stock, and had adopted a plan, whereby it paid $455 per share. The stockholders holding the remaining 536 shares of stock, refused to sell at that price, and an agreement was worked out, whereby it was determined that each share was worth, not $455, as contained in the plan, but $1,500 per share. This agreement to purchase the stock at $1,500 per share, was approved in the above case.

D The Opinion of the Court of Appeals is Wrong

The Court of Appeals after setting forth the contentions states that the relief prayed by the petitioners could not be granted. They only asked for relief as an alternative in the event the Court permitted respondent to recover the stock held by them. Petitioners sought first to have respondent denied the right to compel them to transfer their shares of stock to the respondent. Only in the event such relief was granted did they want alternative relief.

Section 9364-1 of the General Code Specifically requires that policyholders *whose insurance shall THEN be in force, and shall have been in force for at least one year prior to such meeting,* are the ones to vote for mutualization. The Court of Appeals construes that statute to mean that when policyholders voted in 1941 and their ballots were counted in 1947, that it complied with the statute. If that is so, then there is nothing to prevent a vote of policyholders held in 1941 to be counted in 1981, or at any time. Such construction of the statute in its application to the facts in the present case is clearly erroneous.

The Court of Appeals finds, as a matter of undisputed facts, that when the voting trust agreement expired in January of 1947, the petitioners refused to renew it, Then the Court points out in its Opinion that they did nothing to withdraw the offer to the policyholder to mutualize the company. Such findings patently are inconsistent. If they refused to renew the voting trust, they then in effect, said that the voting trustees shall no longer, on their behalf proceed with mutualization. It is an admitted fact that in January of 1947 the vote of the policyholders which had been mailed in 1941 had not as yet been counted. Assuming, for the sake of argument that the Court of Appeals is right in stating that the 1941 policyholders could vote

in 1947, we question how such a vote can be had, and the Superintendent's approval obtained in June of 1947 when the petitioners option as represented by the voting trustees expired in January of 1947?

The petition herein should be granted and reviewed by this court on authority of *Connecticut Mutual Life Insurance* v. *Moore,* 92 Supreme Court L. Ed. 647:

> "Consequently a case or controversy arising from a statute interpreted by the state court is here with precise federal constitutional questions as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at the maturity of the policy. A judgment on that class of policies should be reviewed by this Court. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 228 U. S. 249, 259, 77 L ed 730, 733, 53 S Ct 345, 87 ALR 1191; *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 79 L ed 949, 55 S Ct 486. See *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 459-463, 89 L ed 1725, 1733-1736, 65 S Ct 1384.

We respectfully submit that the decision by the Ohio Courts, effectively deprives petitioners of their property. Shares of stock which petitioners owned, and which are worth Five Million Dollars, they are compelled to turn over to respondent for less than One Million Dollars. This is accomplished by Ohio stretching the application of a statute far beyond the intention of the legislature in the enactment of the statute. The construction placed on the mutualization act by the Ohio Courts, in the application of said act to the facts in the present case, is clearly a violation of the Constitutional rights of petitioners.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that, (a) an important question of general law having been decided in a way probably untenable and in conflict with the weight of authorities; and (b) an important question of Federal law which has not been, but should be, settled by this Court; and (c) the State Court having decided a Federal question in a way probably in conflict with applicable decisions of this Court; it may be properly reviewed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Ohio and finally reverse it.

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APPENDIX "A

MEMORANDUM OF COURT OF COMMON PLEAS GRANTING RELIEF PRAYED FOR IN THE PETITION AND SUPLEMENTAL PETITION AND DISMISSING CROSS PETITION

SCHNEIDER, J.:

A reiteration of the facts and issues involved, in view of the excellent and exhaustive briefs of counsel, would serve no purpose.

After long and careful consideration of the claims of defendants, the Court has concluded that the decision in case No. A-108980 Hamilton County Court of Common Pleas, affirmed by the Court of Appeals, is binding in determining the issues in the present proceeding.

Any rights which the defendants have under this proceeding, as defined in General Code 9364-2, must of necessity depend upon whether defendants, as stockholders, failed to assent to the plan of mutualization or had been concluded by the vote of assenting stockholders or had objected and made demand in writing before an agreement had been reached fixing a fair cash value. As this Court understands the decision in case A-108980, these defendants do not come within such classification.

The Court does have some reservation in connection with the claim that there was no legal approval by a majority of the policyholders of the company. However, if there is merit to this contention, only the policyholders could be interested, and if we assume that the reserves or surpluses of the Company have increased, as claimed by defendants, in the period between 1941 and 1947, the present policyholders cannot complain.

An entry may be presented granting the relief prayed for in the petition and the supplemental petition. The cross-petition will be dismissed.

APENDIX "B"

OPINION OF THE COURT OF APPEALS

BY THE COURT:

The plaintiff having alleged the performance of all the procedural proceedings essential to convert a stock insurance corporation into a mutual insurance corporation, and that it had notified the defendant stockholders thereof and requested them to deliver their shares and the certificates therefor, upon payment of $25.00 per share, as provided in said plan of mutualization, and their refusal, and that they had waived tender of said amount, prays that the defendants be decreed to surrender said certificates for cancellation upon payment of $25.00 per share, and that upon failure to so surrender said certificates, and the payment into Court of $25.00 per share, that the Court decree the cancellation of said stock and that said decree operate in lieu of said surrender of said certificates. As it is apparent, the petition invokes the exercise of the jurisdiction conferred by Section 9364-2a, General Code, upon the Court of Common Pleas to grant the relief prayed for upon proof of the completion of the mutualization process.

Identical petitions were filed against many stockholders. These actions were consolidated in accordance with a stipulation that the rights of all the defendants were identical.

The defendants answered admitting that all of the de-

fendants as owners of 33,570 shares, excepting the owners of 46 shares had, through the instrumentality of a voting trust, voted as stockholders in favor of the mutualization, and that the owners of the 46 shares had been concluded by the vote of the majority in favor of said plan.

As we construe the answer and cross-petition, they deny that what was done was effective to accomplish mutualization for the following reasons:

(1) The long delay from July 29th, 1941, when the directors adopted the plan, and it was approved by the stockholders on August 7th, 1941, to June 27th, 1947, when it was approved by the Superintendent of Insurance.

(2) Representations by the Board of Directors that the price of $25.00 per share was fair and reasonable.

(3) The alleged great enhancement in value of the stock since the vote of the stockholders approving the plan and the price.

(4) Their inability to sell their stock at its alleged enhanced value during said period because of the pendency of the mutualization proceedings.

(5) Inadequacy of the dividends declared during said period.

(6) Failure to notify them of the meeting of the policy holders.

(7) Expiration of the voting trust in which they had joined before the meeting of the policy holders, at which they approved the plan.

(8) Change in personnel of policy holders during the interval.

There are other allegations of conclusions which the pleader draws from the foregoing allegations, but these add nothing to the defensive allegations.

In the prayer to the cross-petition, the defendants seek to condition the relief sought by the plaintiff upon paying to them the sum of $125.00 per share or such amount as might be determined by the court or by appraisers appointed by the court, or the division and distribution of the accumulation of profits alleged to have taken place during the delay.

We think it would tend to narrow the inquiry to say here that as we view it, none of the affirmative relief for which the defendants pray as a condition to relief to the plaintiff could, under any circumstances, be granted.

If the mutualization has been accomplished, the plaintiff is entitled to the relief sought. If it has not been accomplished, the plaintiff remains a stock insurance corporation, in which the defendants are stockholders with all the rights of stockholders.

By reply, the plaintiff denied any fault resulting in delay on its part, admitted that no dividends had been paid since April 1st, 1948, admitted that the voting trust expired on January 2nd, 1947, and was not renewed by defendants, and affirmatively alleged that prior to completion of mutualization the defendants did not undertake to withdraw their votes, or consent or in any manner indicate that they no longer acquiesced therein. The plaintiff also admitted giving the notice of completion of the mutualization by the approval of the Superintendent of Insurance and the demand for the surrender of the stock.

Later, by supplemental petition, the plaintiff alleged the filing of an action by defendant — Ernestine Pattison — on behalf of herself and other stockholders, too numerous to mention, but effected in the same way against this plaintiff, seeking a declaratory judgment as to her rights as a stock holder, in view of said proceedings for mutualization, and

an injunction, in which she set forth the facts as alleged by the plaintiff in this action, in which action by Ernestine Pattison, the court, on demurrer to said petition, declared that all proceedings to effect the mutualization of the corporation had been duly and regularly performed, "that there existed," as a result, "a valid and binding contract between the defendant company, its shareholders and policy holders, which, in view of the absence of any fraud, is not open to attack," that this judgment was affirmed by the Court of Appeals, and is conclusive upon all the parties.

By answer to this supplemental petition, the defendants admitted the facts excepting the terms and effect of what the court had declared. The defendants' interpretation would have left open their right to have the value of their stock determined in an action, such as this, to require a surrender of the stock and certificates. As we have already stated, we are of the opinion that such relief cannot be granted in this case. And we do not construe the decision in the Ernestine Pattison case as so declaring.

On these pleadings, the case came on for trial in the Court of Common Pleas, and, after a trial, the court rendered judgment for the plaintiff in accordance with its prayer and dismissed the defendants' cross-petition, and overruled their motion for a new trial. It is from that judgment that this appeal on law and fact was taken.

The case is now under submission after a trial at which the evidence introduced in the common pleas court trial was introduced by agreement of counsel and additional evidence in the form of a deposition was introduced, likewise by agreement.

However, we find very little, if any, dispute as to the essential facts. They are indisputable.

The Board of Directors adopted this plan of mutualization on July 25th, 1941, in accordance with Section 9364-1 to 9364-8, General Code. A meeting of the stockholders was called, to be held on August 7th, 1941. At that meeting all the defendants, excepting the holders of a few shares, voted in favor of the plan. None of the defendants voted against it, and all became bound by the action of the stockholders at that meeting. No stockholder availed himself of a dissenter's right to have the value of his stock fixed, as provided for in Section 9364-2a, General Code.

A meeting of the policy holders to consider said plan was called for October 24th, 1941. At that meeting it was disclosed that a policy holder by the name of Belden had filed an action to enjoin the mutualization. This action did not reach final judgment until November 13th, 1944, when the Supreme Court of the United States dismissed Belden's appeal, thereby in effect affirming the Supreme Court of Ohio in favor of the defendant and sustaining the validity of the mutualization statutes.

In the meantime, two other policy holders had sued to enjoin the mutualization. This litigation was not finally concluded until June, 1947.

Because of the pendency of this litigation, the meeting of the policy holders was adjourned from time to time. At the meeting on October 27th, 1941, the meeting was adjourned to April 30th, 1942, and finally at another adjourned meeting, the meeting was adjourned to re-assembly at the call of the Superintendent of Insurance. On the termination of the litigation challenging the right to mutualization, the Superintendent of Insurance sent notice to each of the policy holders who had attended the meeting of October 24th, 1941, that the meeting would re-convene on June 26th, 1947. At that meeting the policy holders

voted in favor of mutualization on the plan submitted by the directors and stockholders.

It is urged that notice should have been sent to all the holders of policies on the date of the notice. But this meeting was not of those policy holders. It was a continuance of the meeting of October 24th, 1941. Those who had attended that meeting were the only ones eligible to attend the later session and resume consideration of the unfinished business of that meeting. When the policy holders convened and organized on October 24th, 1941, and it was determined that a majority of the policy holders were present in person or by proxy, that boy became the representative of the entire body of policy holders and authorized to accept or reject the proposal made by the stockholder. We hold that the notice was sufficient, the meeting duly held, and its action binding upon all of the policy holders, and that upon the approval of such proceedings by the Superintendent of Insurance, the plaintiff became and is now a mutual insurance company.

Counsel insists that to require the defendants to submit to a valuation of their stock fixed in 1941, is inequitable, unjust, and confiscatory. In answer to this, we say, that we are not convinced that the evidence shows that their stock, unfettered by the pendency of this mutualization plan, would be worth substantially more than $25.00 per share at the present time, but, aside from that, it does not seem that the defendants are in a position to challenge the consummation of this plan. They, as stockholders initiated this plan. They made the offer to the policy holders in 1941. This offer remained pending during the intervening years. They had it in their power to withdraw this offer. Section 9364-2a, G. C. Undoubtedly, many annual meetings of stockholders took place during the pendency of this

offer. Without doubt, special meetings of stockholders could have been called. At these meetings, the defendants could have secured a withdrawal of the plan, provided only that they secure the cooperation of the requisite number of their fellow stockholders, which would not have seemed too difficult, if the company assets available to stockholders had increased to the extent claimed. But the defendants took no action whatever to secure a withdrawal of the plan. After their offer had been accepted by the policy holders and approved by the Superintendent of Insurance, it is too late for withdrawal.

We are also of the opinion that the defendants are bound by the judgment declaring rights of stockholders in the Ernestine Pattison case. It is true that the court declared in that case that if the stockholders did not consent to comply with the demand that they surrender their stock for $25.00 per share, they could hold their stock until such time as the provisions of Section 9364-2a, General Code, had been complied with. That, of course, is true, but when it appears that all the mutualization requirements have been met, that section has been complied with, and nothing remains to be done but the surrender and cancellation of the stock.

For these reasons, this Court finds in favor of the plaintiff and awards to it the relief prayed for in its petition, and dismisses the cross-petition of the defendants.

HILDEBRANT, P. J., MATTHEWS AND METCALF, JJ., CONCUR.

(Metcalf, J., of the Fourth Appellate District, sitting by designation, in the First Appellate District.)

APPENDIX "C"

Sec. 9364-1. Conversion of domestic stock life insurance Corporation into a mutual life insurance Corporation; plan; "policyholder" defined.

Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; the term "policyholders" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be

deemed one policyholder for the purposes hereof; in case any such such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as provided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1000 or more shall be deemed to include any annuity contract, th commuted value of which is $1000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the corporation, and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the super-

intendent of insurance an dto the corporation the result thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the superintendent of insurance; that all necessary expenses incurred by the superintendent shall be paid by the corporation as certified to him; and (4) shall have been submitted to the superintendent of insurance and to the corporation the result in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the corporation, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

Sec. 9364-2 Acquisition of stock.

If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of the

preceding section, acquire any shares of its own stock by gift, bequest or purchase. Until all of such shares are acquired, any shares so acquired or acquired pursuant to the provisions hereinafter made concerning dissenting stockholders shall be acquired in trust for the corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation is acquired when the entire capital stock shall be retired and cancelled and thereupon, the corporation shall be and become a mutual life insurance corporation without capital stock.

29

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HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1952

No. 808

JOHN W. PATTISON, ALETHEIA E. PATTISON, ANNA W. PATTISON, ERNESTINE PATTISON, MARIE S. PATTISON, ELI G. ALCORN, III, ROBERT S. ALCORN, JR., EDITH M. ALCORN, JANET ALCORN WAGNER, ESCULENE R. WILLIAMS, and LATHROP B. NELSON,

Petitioners,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This cause grows out of statutory proceedings to consummate the mutualization of The Union Central Life Insurance Company under Section 9364-2a of the Ohio General Code. The section is not set forth in Petitioners' brief, but is set out in the appendix hereto. The Ohio mutualization laws, of which the foregoing is part, are substantially similar to those of other states pursuant to which mutualization has been accomplished.* It will be noted that Peti-

* See for example: Illinois Revised Statutes (1951), Chap. 73, § 647; Insurance Laws of New York, § 199; Pennsylvania, Act of April 20, 1921, P. L. 175; South Dakota, Code of 1939, § 31.1803 et seq. as added by Chap. 117, Laws, 1949; Insurance Laws of Utah (1947), § 43-8-7.

tioners' brief at page 17 concedes "the statutes of Ohio are not greatly different than similar statutes of a dozen other states." Under the Ohio statute, General Code Sections 9364-1 to 9364-8 inclusive, stock insurance companies are authorized to "mutualize" pursuant to the adoption of a plan by its directors, and approved by its shareholders, its policyholders and the Superintendent of Insurance. These four statutory steps were taken. The mutualization proceedings were initiated by a group of shareholders and the Petitioners were members of that group and participated in the promotion thereof as shareholders and caused the shares which they owned and controlled to be voted in favor of the plan of mutualization which had been adopted by the board of directors and which provided for the payment to shareholders of $25 per share.

Completion of the statutory steps was delayed by suits brought by policyholders who claimed that the plan was too favorable to the shareholders. One of these cases was before this Court in the case of *Belden* v. *Union Central*, 323 U. S. 674. This Court dismissed the appeal. Upon the termination of other policyholder litigation, the mutualization was completed.

The shareholders who are the Petitioners herein, although they had initiated the mutualization and had filed no dissents under the statute, contended that by reason of the delay which occurred during the contests with policyholders who sought injunctions, the amounts which they were to receive under the plan of mutualization were no longer adequate, and on March 1, 1948, they filed suit in the state court of Ohio for a declaratory judgment adjudicating their rights under the mutualization proceedings. Their petition set forth their contentions. The case is the one referred to as the *Ernestine Pattison* case in the opinion of the Court of Appeals in this case (Appendix B, page 28 of Petitioners' brief). The Court of Appeals of Ohio in

the *Ernestine Pattison* case rendered final judgment and decree declaring the rights of the parties and including a declaration that the petitioning shareholders were obligated to surrender their shares in accordance with the plan of mutualization at $25 per share upon completion of the proceedings set forth in Section 9364-2a. No further appeal was taken from this declaratory judgment. The present action was accordingly brought by Respondent pursuant to Section 9364-2a to compel Petitioners to surrender their certificates for cancellation.

The basic contention of the Petitioners, it will be noted, is that they were given an insufficient price for their shares. It will be noted in the opinion of the Court of Appeals set forth on page 27 of the appendix to Petitioners' brief that the Court of Appeals said:

> "We are not convinced that the evidence shows that their stock, unfettered by the pendency of this mutualization plan, would be worth substantially more than $25 per share at the present time."

The Court, therefore, determined that there was no factual basis to support the claim that the amounts to be received by Petitioners was unfair. This Court has indicated that it will not ordinarily review questions of facts determined by state courts. *Minneapolis & St. L. Ry.* v. *Minnesota,* 193 U. S. 53, 64, 65; *Egan* v. *Hart,* 165 U. S. 188, 189. The Supreme Court of Ohio dismissed the appeal from the Court of Appeals on the ground that no debatable constitutional question was involved and also denied a motion to require the Court of Appeals to certify the record.

ARGUMENT

I. The Judgment of the Supreme Court of Ohio Rests Upon an Adequate and Independent Non-Federal Ground.

It will be noted from the opinion of the Court of Appeals (which the Supreme Court of Ohio refused to dis-

turb) that the Court held that the present Petitioners were precluded by the doctrine of estoppel by judgment. The same issue had been adjudicated between the same parties in the declaratory judgment case. In the opinion of the Court of Appeals which is set out on page 28 of Petitioners' brief the Court set forth the following:

> "We are also of the opinion that the defendants are bound by the judgment declaring rights of stockholders in the *Ernestine Pattison* case. It is true that the court declared in that case that if the stockholders did not consent to comply with the demand that they surrender their stock for $25.00 per share, they could hold their stock until such time as the provisions of Section 9364-2a, General Code, had been complied with. That, of course, is true, but when it appears that all the mutualization requirements have been met, that section has been complied with, and nothing remains to be done but the surrender and cancellation of the stock."

This Court has stated in *Herb* v. *Pitcairn*, 324 U. S. 117, 125:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."

See also *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

In *Belden* v. *The Union Central Life Insurance Company*, and *Koplin* v. *Ohio National Life Insurance Company*, 323 U. S. 674, the Court said:

> "In each of these cases the motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it."

See also *Northern Pacific Railroad Co.* v. *Ellis*, 144 U. S. 458, 464; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468.

II. The Petitioners Herein Have No Standing to Attack the Constitutionality of the Statute.

This Court in *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, has indicated that shareholders instigating proceedings under a statute will not be heard to assail the validity of the statute. It will be noted that the Court of Appeals, in the opinion set forth on page 27 of Petitioners' brief, speaking of the Petitioners, said:

> "They, as stockholders initiated this plan. They made the offer to the policyholders in 1941. . . . After their offer had been accepted by the policyholders and approved by the Superintendent of Insurance, it is too late for withdrawal."

See also *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; *Fahey* v. *Mallonee*, 332 U. S. 245, 255.

III. Petitioners Have Conspicuously Failed to Comply With the Rules of This Court.

Petitioners have failed to follow the requirements of Rule 12, par. 1 and Rule 38, par. 2 of this Court in that they have failed (1) to specify the stage in the proceedings in the Court of first instance and in the appellate court at which and the manner in which the federal questions sought to be reviewed were raised; (2) to specify the method of raising the federal questions sought to be reviewed; (3) to specify the way in which the federal questions were passed upon by the Court; (4) to include pertinent quotations or specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision claimed to confer jurisdiction on this Court.

Petitioners have failed to serve on Respondent a printed copy of the record. (Rule 38, part 3.)

CONCLUSION

The basic contention of Petitioners is that the amount provided in the plan of mutualization to be paid for their shares has become inadequate. The Ohio courts have decided on the facts that the delay was not unreasonable and that the contention as to the alleged change in value is not correct. The decision of the Ohio courts rests on more than one ground, one of which is that the Petitioners are bound under the doctrine of estoppel by judgment by reason of a previous adjudication against the same parties relative to the same plan of mutualization. Said independent non-federal ground is fully adequate to support the judgment. The Petitioners having invoked the mutualization statute may not now assert its invalidity. Moreover, Petitioners have failed to comply with the rules of this Court.

Wherefore Respondent submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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WALTER M. SHOHL,
POTTER STEWART,
VIRGIL D. PARISH,
DINSMORE, SHOHL, SAWYER & DINSMORE,
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APPENDIX

General Code of Ohio Sec. 9364-1. Conversion of domestic stock life insurance corporation into a mutual life insurance corporation; plan; "policyholders" defined.

Any domestic stock life insurance corporation, duly incorporated under a general law, may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock, provided, however, that such plan: (1) shall have been adopted by a vote of a majority of the directors of such corporation; (2) shall have been approved by a vote of stockholders representing a majority of the capital stock then outstanding at a meeting of stockholders called for the purpose; (3) shall have been approved by a majority of the policyholders voting at a meeting, called for the purpose, of policyholders each insured in at least one thousand dollars and whose insurance shall then be in force and shall have been in force for at least one year prior to such meeting; the term "policyholder" as used herein shall be deemed to mean the person insured under an individual policy of life insurance, and the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in cases of assignment as hereinafter provided: in the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons insured or the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof; in case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall have been filed at the principal office of the corporation at least thirty days prior to the date of said meeting, then such assignee shall be deemed a policyholder within the meaning hereof; except as pro-

vided herein, an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof; the reference herein to insurance in the amount of $1000 or more shall be deemed to include any annuity contract, the commuted value of which is $1000 or more on the date of said meeting, and any pure endowment contract for the principal sum of $1000 or more; notice of such meeting shall be given by mailing such notice from the home office of such corporation at least thirty days prior to such meeting in a sealed envelope postage prepaid addressed to such policyholders at their last known post office addresses, provided, that personal delivery of such written notice to any policyholder evidenced by written receipt therefor may be in lieu of mailing the same, and such meeting shall be otherwise provided for and conducted in such manner as shall be provided in such mutualization plan; provided, however, that policyholders may vote in person, by proxy or by mail; that all votes shall be cast by ballot on a uniform ballot furnished by the corporation, and the superintendent of insurance shall supervise and direct the method and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the superintendent of insurance and to the corporation the result thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the superintendent of insurance; that all necessary expenses incurred by the superintendent of insurance shall be paid by the corporation as certified to by him; and (4) shall have been submitted to the superintendent of insurance and shall have been approved by him in writing; provided that every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the superintendent, and provided that neither such plan, nor any such payment, shall be approved by the superintendent unless at the time of such approvals, respectively, the cor-

poration, after deducting the aggregate sum appropriated by such plan for the acquisition of any part or all of its capital stock, and in the case of any payment not fixed by such plan and subject to separate approval as aforesaid after the approval of such plan, after deducting also the amount of such payment, shall be possessed of assets sufficient to maintain its deposit theretofore made with the superintendent of insurance and not less than the entire liabilities of the corporation, including the net values of its outstanding contracts computed according to the standard adopted by the corporation under the provisions of section 636 of the General Code of Ohio, and also all funds, contingent reserves and surplus save so much of the latter as shall have been appropriated or paid under such plan.

Sec. 9364-2. Acquisition of stock.

If a stock life insurance corporation shall determine to become a mutual life insurance corporation, it may, in carrying out any plan to that end under the provisions of the preceding section, acquire any shares of its own stock by gift, bequest or purchase. Until all of such shares are acquired, any shares so acquired or acquired pursuant to the provisions hereinafter made concerning dissenting stockholders shall be acquired in trust for the corporation as hereinafter provided and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote, until all of the capital stock of such corporation is acquired when the entire capital stock shall be retired and cancelled and thereupon, the corporation shall be and become a mutual life insurance corporation without capital stock.

Sec. 9364-2a. Rights and privileges of dissenting stockholder; abandonment of plan of mutualization.

If a stockholder of the corporation shall file with the corporation, prior to or at the meeting of the stockholders at which the plan is submitted to a vote, a written objection to such plan and shall not vote in favor thereof, and

such stockholder within twenty days after the plan is approved by such meeting shall make written demand on the corporation for payment of the fair cash value of his shares as of the day prior to the date on which such plan is approved by the stockholders, excluding from such fair cash value any appreciation or depreciation in consequence of such mutualization, such stockholder shall be entitled to receive within ninety days after such fair cash value is agreed upon or determined, upon surrender of his certificate or certificates representing his shares, such fair cash value thereof. Any stockholder who fails to make such objection or having objected fails to make demand within the twenty day period shall be conclusively presumed to have consented to the plan and shall be bound by the terms thereof.

Any such objection and demand for the payment of the fair cash value of shares shall state the number and kind of shares held by the dissenting stockholder making the demand, and the amount which such stockholder claims is such fair cash value.

The right of a dissenting stockholder to be paid the fair cash value of his shares shall cease if and when the corporation for any reason and in accordance with the provisions hereinafter set forth shall abandon the plan to mutualize the corporation.

No demand for payment of such fair cash value may be withdrawn by the stockholder making the same unless the corporation, by its board of directors, shall consent to such withdrawal.

Within ten days after the receipt of any such demand the corporation shall inform such stockholder in writing whether or not it will pay the demanded amount, and, if it refuses to pay such amount, it shall offer in writing to pay an amount as and for such fair cash value.

If, within thirty days after the date of the written demand mentioned in the preceding paragraph, the value of such shares is agreed upon between the dissenting stockholder and the corporation and such value is approved by the superintendent of insurance, payment therefor shall be made within ninety days after the date of such agreement upon the surrender of his certificate or certificates

representing such shares. Upon payment of the agreed value the dissenting stockholder shall cease to have any interest in such shares and shall cease to be a stockholder in the corporation but the shares previously held by him and upon which he has been paid such fair cash value shall be transferred to and held by the trustees appointed hereinafter provided for the benefit of the corporation.

If, within such period of thirty days, the stockholder and the corporation do not so agree, the corporation, or the dissenting stockholder if he has complied with all the conditions of this section, may within sixty days after the expiration of the thirty day period, petition the court of common pleas of the county in which the principal office of the corporation is located, to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken approving such plan.

If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting stockholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting stockholder as above provided.

Such petition shall contain a brief statement of the facts and shall show the vote and action objected to and facts entitling such dissenting stockholder to the relief demanded.

Upon the filing of such petition, the court of common pleas, on the motion of the petitioner, shall enter an order, fixing a date for hearing, and requiring a notice of the filing and prayer of such petition and of the date for hearing to be given to the respondent or defendant in the manner in which a summons is required to be served or substituted service is required to be made in other cases.

On the day fixed for the hearing of such petition, or any adjournment thereof, the court shall determine from the petition and such evidence as may be submitted by either party whether the dissenting stockholder is entitled to be paid the fair cash value of any share or shares, and, if so, the number of such shares, and if the court shall find and order that such stockholder is entitled to be paid the fair

cash value of any number of shares, the court shall appoint three appraisers to determine the fair cash value of such number of shares as of the day before the vote so objected to was taken, excluding from such fair cash value any appreciation or depreciation in consequence of such mutualization or such vote, and said court shall further instruct said appraisers respecting their duties in making such determination.

Said appraisers shall forthwith proceed to determine said fair cash value and said appraisers, or a majority of them, shall make a report or award within ten days, unless the court shall enlarge said time, and shall file such report in the office of the clerk of such court, whereupon, on the motion of either party, said report shall be submitted to the court and considered on such evidence as the court may consider relevant, and if said award shall be found to be reasonable, and shall be confirmed and approved by the court, judgment shall be rendered against the corporation for the payment of the amount of the award, with interest at six per cent from a date which shall be fixed in such judgment.

If such appraisers, or a majority of them, shall fail to make and file an award within ten days, or within such further time as may be fixed by the court, or the award shall not be confirmed by the court, it shall summarily determine the fair cash value of said number of shares and render judgment therefor.

Any judgment shall further provide that simultaneously with the payment thereof the certificate evidencing the shares of stock affected thereby shall be surrendered to the corporation and upon the failure of the holder thereof to so surrender such certificates the judgment shall stand as a cancellation of such certificates.

The costs of the proceedings, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court may consider equitable.

Such a proceeding shall be deemed to be a special proceeding within the meaning of section 12223-2 of the General Code, and final orders therein may be reviewed,

affirmed, modified or reversed as provided in title V, part third, of the General Code.

Two or more dissenting stockholders may join as plaintiffs or be joined as defendants in any such proceeding, and two or more such proceedings may be consolidated.

A stockholder who so objects in writing and demands in writing payment of the fair cash value of any shares shall not be entitled to vote such shares or to exercise any rights respecting such shares or to receive any dividends or distributions thereon, unless and until the plan of mutualization shall, for any reason, be abandoned, or, with the consent of the corporation, the objection and demand shall be withdrawn; provided that if, prior to such abandonment dividends shall be paid in money to stockholders of the same class as those dissenting and who are of record on or after the day on which the vote was taken authorizing such mutualization, then and at such times an amount of money equal to the dividends otherwise payable upon such dissenting shares shall be paid to the holders of record thereof who would, except for such dissent, be entitled to receive such dividends, and each such payment shall be a credit upon the total amount to be paid for such shares by or on behalf of the corporation. All the holders of such dissenting shares of record at the time of any such abandonment, shall thereupon be restored to the status of a stockholder; and any of such payments theretofore made on such shares shall be deemed to have been dividends thereon.

Any stockholder who has assented to the plan or who has been concluded by the vote of the assenting stockholders, and any stockholder who has objected and made demand in writing for the fair cash value of his shares subsequent to which an agreement has been reached fixing such fair cash value but who fails to surrender his certificates for cancellation upon payment of the amount to which he is entitled may be ordered to do so by a decree of the court of common pleas for the county in which the principal office of such corporation is located after notice and hearing in an action instituted by the corporation for that purpose and such decree may provide that upon the

failure of such stockholder to surrender such certificates for cancellation such decree shall stand in lieu of such surrender and cancellation.

At any time before there has been a vote of the policyholders approving such plan the corporation may abandon a plan of mutualization by the same vote of the directors and of the stockholders as was required for the adoption of such plan. Upon such abandonment the rights of any stockholders to be paid for their stock in accordance with the plan, and the rights of any dissenting stockholders to be paid the fair cash value of their stock whether or not judgment may have been rendered therefor shall cease and terminate and the corporation shall continue to conduct its business as a domestic stock life insurance corporation as though no plan of mutualization had ever been adopted.

Sec. 9364-2b. Appointment, qualification, bond, etc., of trustees; deposit by corporation retained by superintendent of insurance.

The trustees provided for in section 9364-2 shall be appointed and vacancies shall be filled by the superintendent of insurance. Such trustees shall be duly qualified directors of the corporation at the time of such appointment and shall continue as such trustees until the purpose of this trust is accomplished or abandoned unless removed for cause by the superintendent of insurance. Said trustees shall file with the superintendent of insurance a duly verified acceptance of their appointment and declaration that they will faithfully discharge their duties as such trustees. Such trustees shall give and file with the superintendent of insurance bonds in such an amount as under the circumstances the superintendent of insurance deems just and proper with sureties thereon approved by the superintendent of insurance. All dividends and other sums received by said trustees on the shares of stock held by them shall be immediately repaid to said corporation. The necessary expenses of executing the trust shall be paid by the corporation. All shares held by such trustees shall be deemed admitted assets of such corporation at their par value.

Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of such corporation. The deposit of one hundred thousand dollars in securities and/or mortgages made by such corporation pursuant to section 9346, General Code, shall be retained by the superintendent of insurance in trust for the benefit and security of all of the members and policyholders of such corporation.

Sec. 9364-3. Officers and directors.

When a stock life insurance corporation has become converted into a mutual life insurance corporation as herein provided, the officers and directors or trustees of the original corporation so converted shall remain as the officers and directors or trustees of the newly converted corporation until the next annual meeting for the election of officers and directors or trustees, when their successors shall be elected in the manner provided in the articles of incorporation and code of regulations by said corporation theretofore adopted.

Sec. 9364-4. Corporate powers, how exercised.

The corporate powers of a domestic mutual life insurance corporation shall be exercised by, and its business and affairs shall be under the control of, a board of directors or trustees composed of not less than three nor more than twenty-one natural persons who are policy-holders or members and who are at least twenty-one years of age and at least three of whom are residents and citizens of this state.

Sec. 9364-5. Terms of directors or trustees.

In order to secure continuity of membership in its board of directors or trustees, the articles of incorporation of any such corporation may provide for division of the board into not more than three classes as nearly equal in number as possible and fix the term of office for each class. Unless such provision is made in the articles of incorporation all directors and trustees shall be elected annually.

Sec. 9364-6. Meetings.

Meetings of the board of directors or trustees shall be upon such notice as the code of regulations may prescribe. Attendance of a director or trustee at any meeting shall constitute a waiver of notice of such meeting except where a director or trustee attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors or trustees need be specified in the notice or waiver of notice of such meeting.

Sec. 9364-7. Executive committee.

If the code of regulations so provides, the board of directors or trustees, by a resolution adopted by a majority of the whole board, may designate three or more of their number to constitute an executive committee, which committee shall, to the extent provided in the resolution or in the code of regulations, have and exercise, during the interim between the meetings of the board, all of the authority of the board in the management of the corporation, but the designation of such committee shall not relieve the board or any member thereof of any responsibility imposed by law.

Sec. 9364-8. Code of regulations; contents; alteration, etc., of code.

(a) The code of regulations of any such corporation shall provide that each policyholder of the corporation shall be a member of the corporation. The term policyholder as used herein shall be deemed to mean the person insured under an individual policy of life insurance, the person to whom any annuity or pure endowment is presently or prospectively payable by the terms of an individual annuity or pure endowment contract, except where the policy or contract declares some other person to be the owner or holder thereof, in which case such owner or policyholder shall be deemed the policyholder, and except in

cases of assignment as hereinafter provided. In the case of any individual policy or contract insuring two or more persons jointly, the persons insured, or in case the policy or contract declares two or more persons to be the owner, the persons so declared to be the owner shall be deemed one policyholder for the purposes hereof. In case any such policy or contract shall have been assigned by an assignment absolute on its face to an assignee other than the corporation, and such assignment shall be filed at the principal office of the corporation, then such assignee shall be deemed a policyholder within the meaning hereof, but for the purpose of determining voting rights such assignment shall not be effective until thirty days after it shall have been filed with the corporation. Except as provided herein an assignee of a policy or contract shall not be deemed to be a policyholder within the meaning hereof.

Such code of regulations shall provide that each policyholder insured in at least $1000.00, or holder of an annuity, which at normal date of maturity requires the payment of $100.00 or more annually, and whose insurance or contract of annuity shall then be in force and which has been in force for at least one year prior to a policyholders' meeting, shall be entitled to one vote only irrespective of the number of policies or contracts held by him or the amount thereof.

(b) The power to make, alter, amend or repeal the code of regulations shall be vested in the board of directors or trustees unless reserved to the members by the articles of incorporation.

(c) The code of regulations of a mutual legal reserve life insurance corporation shall provide that such corporation shall issue no policy of life insurance or annuity contract which provides for the payment of any assessment by any policyholder or member in addition to the regular premium charged for such insurance or annuity.